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Nos. 08-289 and 08-294 (Consolidated)

In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, ET AL.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, et al.,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER SUPERINTENDENT

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QUESTIONS PRESENTED

1. By mandating that the State of Arizona provide for a minimum amount of earmarked funding specifically allocated for English Language Learner programs statewide to comply with the "appropriate action" requirement of §1703(f) of the Equal Education Opportunity Act, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state legislatures to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in §1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

PARTIES INVOLVED

Petitioner is Thomas C. Horne, Superintendent of Public Instruction of the State of Arizona.

Respondents Speaker of the Arizona House of Representatives and President of the Arizona Senate were Intervenor-Appellants below. These Respondents are also Petitioners in Case No. 08-294 which has been consolidated with this matter.

Respondents, who were Defendants-Appellants below, are the State of Arizona and the Arizona State Board of Education.

Respondents who were Plaintiffs-Appellees below are Miriam Flores, individually and as a parent of Miriam Flores, a minor child, and Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child, on behalf of themselves and all others similarly situated.

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BRIEF FOR THE PETITIONER SUPERINTENDENT

OPINIONS BELOW

The opinion of the Court of Appeals is published at 516 F.3d 1140 (9th Cir. 2008). App. 1-92.[1] The order of the District Court is published at 480 F. Supp. 2d 1157 (D. Ariz. 2007). App. 93-115. An earlier Memorandum Decision of the Ninth Circuit was filed August 23, 2006. App. 116-20. The original judgment from which the Petitioner sought Rule 60(b)(5) relief is published at 172 F. Supp. 2d 1225 (D. Ariz. 2000). App. 154-91.

JURISDICTION

The Petition for Writ of Certiorari was filed on August 29, 2008, and was granted on January 9, 2009. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

[1] "App." refers to Petitioner Superintendent's Appendix to the Petition for Certiorari followed by the page. "I. App." refers to the appendix of the Petitioners Speaker of the Arizona House and President of the Arizona Senate. "CR" refers to the District Court's Docket Sheet. TE refers to trial exhibits followed by the exhibit number. "Tr.Day___, p.___" refers to the day of the transcript of the evidentiary hearing followed by the page. The days of the hearing transcript are as follows: Day 1 – January 9, 2007; Day 2 – January 10, 2007; Day 3 – January 11, 2007; Day 4 – January 12, 2007; Day 5 – January 13, 2007; Day 6 – January 18, 2007; Day 7 – January 24, 2007; Day 8 – January 25, 2007.

STATUTORY PROVISIONS INVOLVED

The Equal Education Opportunity Act of 1974 ("EEOA"), 20 U.S.C. §1703(f) states (emphasis added):

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . .
>
> (f) the failure by an educational agency to take ***appropriate action*** to overcome language barriers that impede equal participation by its students in its instructional programs.

The provisions of the No Child Left Behind Act ("NCLB"), 20 U.S.C. §6801, *et seq.*, are extremely lengthy and are set out in the Appendix to the Superintendent's Petition for a Writ of Certiorari. App. 196-261.

STATEMENT OF THE CASE

I. Introduction

The District Court (Hon. Alfredo Marquez) in *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) ("original 2000 order") declared that Arizona's funding and oversight of the Nogales Unified School District's ("NUSD") English language learner ("ELL") program violated EEOA §1703(f) because NUSD lacked sufficient resources to mount an effective ELL program. The program then was Bilingual Education/English as a Second Language ("ESL").

Substantial legal and factual changes occurred in the ensuing seven years, including a change in the ELL program to Structured English Immersion, funding increases, compliance with federal standards under NCLB, better management, and increased oversight. Those changes enabled NUSD to conduct programs reasonably calculated to permit ELL students to learn English and advance academically.

Given these vast improvements, the Superintendent of Public Instruction for the State of Arizona, Thomas C. Horne ("Superintendent"), sought Rule 60(b)(5) relief to end federal court oversight on the ground that compliance with the objectives of §1703(f) had been achieved. Notwithstanding the changes in program and funding, the District Court (then Hon. Raner Collins) made no comment on Arizona's compliance with NCLB, but denied relief in 2007 on the basis that the funding mechanisms of the new statute contained problems that were the same as found in 2006, referring back to an earlier order.[2] 480 F. Supp. 2d 1157. App. 99. Affirming, the Ninth Circuit (different panel than 2006 remand) held that Rule 60(b)(5) relief could only be achieved if Arizona funded ELL programs from a designated source of funds and concluded that "incremental funding is what matters for EEOA purposes." *Flores*

[2] This amounted to a failure to follow the directive from a 2006 Ninth Circuit remand to determine "whether changed circumstances required modification of the original court order" issued in January 2000. App. 110-20.

v. Arizona, 516 F.3d 1140, 1171 (9th Cir. 2008). App. 1-92.

To the contrary, the EEOA is silent about sources of funding. It is a performance statute, not a funding statute. It requires the State to take "appropriate action to overcome language barriers." Accordingly, a proper interpretation of the EEOA requires federal courts to relinquish remedial jurisdiction when the purpose of the EEOA, *i.e.* effective ELL programs, has been achieved. State and local authorities should be permitted to manage their own affairs and if they can show that a federal statutory violation has been cured, albeit not in the manner contemplated by the federal court, they should be allowed to do so.

In this case, "appropriate action" has been taken by improving ELL programming, hiring qualified teachers, and reducing class sizes. At the same time, Arizona's education funding has also substantially increased. In addition to these factual changes, the enactment of NCLB also brought about significant changes to the manner in which ELL students were being taught nationwide. As a result of these measures – all taken since the original 2000 order was entered – ELL students are now provided equal education opportunities by the State of Arizona. Accordingly, Rule 60(b)(5) relief was improperly denied.

II. The History of this Dispute

The Plaintiffs brought the case in the United States District Court for the District of Arizona on behalf of all Hispanic, black, and Native American children enrolled in NUSD. The Defendants are the Superintendent, the State Board of Education, and the State of Arizona. The Second Amended Complaint alleged, among other things, that the Defendants violated Plaintiffs' rights under the EEOA in their "oversight, administration and funding of federally mandated instruction for Limited English Proficient ("LEP" now "ELL") students enrolled in the Arizona public school system." CR83.

On August 28, 1997, the District Court certified the case as a class action. The class was defined as all minority at risk and ELL students "now or hereafter enrolled in the Nogales Unified School District as well as their parents and guardians." CR105. This class was never expanded.

The District Court entered the original 2000 order against the Defendants holding that they violated §1703(f) of the EEOA by failing to adequately fund and oversee NUSD's ELL program. App. 154. A series of post-judgment remedial proceedings ultimately led to contempt orders under which graduated fines, reaching two million dollars per day, were levied against the State. App. 133-53. Legislation (Arizona House Bill 2064) was enacted in the face of these fines. I. App. 268a. The Speaker of the Arizona House of Representatives and President of the Arizona

Senate ("Intervenor-Defendants") were permitted to intervene. CR390. Rule 60(b)(5) motions were filed seeking relief from the original 2000 order because of material changes in ELL funding, programs, and the new legislation. CR422, 433. Without examining whether changed circumstances rendered the original 2000 order satisfied, the District Court held that certain funding mechanisms of HB2064 violated federal law and denied the Rule 60(b)(5) motions. App. 121-32.

Timely appeals were taken from various orders to the Ninth Circuit Court of Appeals (the "First Appeal"). CR 445, 465. The Ninth Circuit issued a Memorandum Decision on August 23, 2006, (App. 116), vacating the prior sanction orders of the District Court and remanding the matter for an evidentiary hearing to determine whether the Intervenor-Defendants and the Superintendent were entitled to relief under Rule 60(b)(5). Significantly, the remand order in the First Appeal stated:

> In the interim, the landscape of educational funding has changed significantly. We have held that, because "the scope of federal relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only . . . federal courts must be sensitive to the need for modification [of permanent injunctive relief] when circumstances change." ***In light of the changes in education programs and funding since the original 2000 order, the district court should have held***

> ***an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original court order*** or otherwise had a bearing on the appropriate remedy.

App. 119-20 (emphasis added).

Eight days of evidentiary hearings were held in January 2007. On March 22, 2007, the District Court entered an order again denying the requested relief under Rule 60(b)(5). App. 93-115.

Instead of focusing on whether new programs, increases in funding, better management, and changes in the law brought NUSD into compliance with §1703(f) of the EEOA, the District Court rested its decision upon analysis of the previously enacted HB2064, although there was no need to address this remedy if conditions sufficiently changed to eliminate liability. App. 99.

The Superintendent and Intervenor-Defendants timely filed separate appeals (the "Second Appeal"). CR639, 640. At the heart of the Second Appeal was the contention that the District Court erred because of its narrow focus on HB2064 and by failing to recognize that the world of education in NUSD, as described in the original 2000 order, no longer existed. This was because new programs, new legal parameters, more funding, and solid management, cured the deleterious conditions described in that order. Evidence presented at the evidentiary hearing unequivocally demonstrated that, by 2007, NUSD

conducted effective ELL programs and complied with §1703(f).

The Ninth Circuit affirmed the District Court. App. 1. It held that Rule 60(b)(5) relief could not be granted until Arizona statutorily appropriated a specific funding source covering the incremental costs of ELL education.[3] App. 40-45, 46-48, 62-64, 68-72. The rationale for this decision was that the legal parameters of the original 2000 order required earmarked funding and that if the problem was cured using district and other funds, that was insufficient. App. 69-70. The Ninth Circuit refused to consider myriad legal and factual changes which showed that not only was NUSD able to conduct effective ELL programs, but also that it complied with the "appropriate action" requirement of §1703(f). According to the Ninth Circuit's logic, "incremental ELL funding is what matters for EEOA purposes," regardless of the quality of the program offered to ELL students. *Flores*, 516 F.3d at 1171. App. 70.

III. The Original 2000 Order

The Ninth Circuit's misplaced focus on "incremental ELL funding" resulted from its misinterpretation of

[3] Incremental costs are generally those ELL costs that are in addition to those costs for conducting programs for English proficient students under Ariz. Rev. Stat. §15-756.01, *et seq*.

the factual and legal findings set forth in the original 2000 order. A careful examination of the original 2000 order reveals the error of the Ninth Circuit's analysis. The 2000 order does not deal exclusively with funding. Rather, it examines how a lack of funding influenced the failure of the ELL programming at NUSD. Accordingly, "what matters for EEOA purposes," is adequate programming *not* funding from a particular source.

At the very outset of the original 2000 order, the District Court stated that the purpose of the lawsuit was to address the alleged failure to provide ELL students at NUSD with a program reasonably calculated to teach them English, all in violation of §1703(f). App. 154. The Plaintiffs asserted that this failure resulted from inadequate funding *and oversight* by the Defendants. App. 157. Thus, the district court's original 2000 order had two primary focuses – (1) evaluating Arizona's funding scheme, and (2) evaluating NUSD's ELL program deficiencies.

In its findings of fact, the District Court addressed Arizona's funding scheme first. Under that scheme, every school district is allotted equalization funds from which it can budget for maintenance and operations. App. 158-59. Those funds are formulaic and, in part, are determined by the number of students enrolled at the school district multiplied by Group "B" weights for certain factors including students with special needs. App. 160. Equalized funding for each district is then determined by multiplying base level funding set by the state by the number of

students for that district. *Id.* The Group "B" weight for ELL students in 2000 was .060 which amounted to approximately $150.00 per pupil. App. 162. To the extent that a district's local tax base was insufficient to raise sufficient monies to meet its equalization entitlement, the State made up the difference. App. 163. A school district, such as NUSD, had the right to increase its equalization allotment by 10% through a voter approved "override" to increase local taxes. App. 164. NUSD, however, had no override and seemed unlikely to pass one because of its low tax base. App. 165-66. The District Court also found that the legislature stopped increasing base level funding at the actual inflation rate. App. 159-60. Because of these financial restrictions, including the inability to pass an override, NUSD was financially stretched so that it could not increase monies for ELL programs without impacting non-ELL programs. App. 166.

With this financial backdrop, the District Court's factual findings then focused on the inadequacies of the ELL program at NUSD and its inability to implement the bilingual and ESL theories of instruction that it had adopted.[4] App. 167-69. Bilingual education strategies failed at NUSD's six elementary schools. App. 170-71. NUSD could not hire enough trained teachers with a bilingual or ESL teaching

[4] Bilingual education teaches students so that they are literate in both English and Spanish. ESL education, in theory, is to teach ELL students sufficient English so that they can be mainstreamed into the regular classroom. App. 169.

endorsement.[5] *Id.* As a result, ELL students languished in overcrowded mainstream classrooms. App. 170. Though the two middle schools adopted an ESL theory of instruction, the same problems beset their program. The middle schools employed so few endorsed teachers that only "newcomers" received instruction in English language development ("ELD") while the majority of ELL students received none. App. 171-72. The ESL model used at the high school level also could not be properly implemented. App. 173-75. The vast majority of ELL students were mainstreamed and received no ELD during the school day. App. 174. NUSD was required to hire non-English speaking teachers to teach ELL students in content areas because it could not afford to hire "endorsed" teachers. App. 175. Other problems included overcrowded classrooms, not enough qualified teachers and teaching aides, insufficient teaching materials, and inadequate tutoring. App. 187. The District Court found that the State provided no assistance to help NUSD rectify these program deficiencies. App. 178.

The District Court then reached a series of legal conclusions. It stated that Group "B" funding of $150.00 for each ELL student was "arbitrary" and not related to actual funding needed for ELL programming. App. 188. It concluded that Group "B" weight

[5] To receive a bilingual endorsement, a teacher must pass a university test showing academic proficiency in Spanish. To receive an ESL endorsement, a teacher should know a second language. App. 168.

funding in combination with other funds provided by Arizona's funding scheme led to a series of program deficiencies. App. 187. It also determined that Arizona provided no assistance to offset funding deficiencies. *Id.* From these conclusions, the District Court held that the Defendants violated the "appropriate action" requirement of §1703(f) because they failed to provide sufficient resources and oversight so as to permit NUSD to implement its bilingual and ESL strategies. App. 188.

One critical feature of the original 2000 order was that funding was never dealt with in isolation from ELL programs. Out of the District Court's sixty-four findings of fact, nearly thirty directly deal with programmatic issues at Nogales. Many of these findings homed in on the pervasive deficiencies of the ELL program and the lack of ELD instruction. The District Court ultimately ruled that the State's funding was inadequate because it failed to provide sufficient "practices, resources, and personnel to remedy language barriers in NUSD." App. 188. What mattered to the District Court was that funding was connected to poor programming and did not allow NUSD's ELL students to overcome language barriers.

Further, the District Court did not measure the adequacy of funding by examining the ELL Group "B" weight alone and ignoring all other funding sources which impacted ELL students. The District Court examined all of the revenue sources available to NUSD. For example, the District Court noted that base level funding failed to keep pace with the rate of

inflation. App. 186. It found that NUSD lacked an override and that the State failed to provide other monies or benefits to make up for lack of funding. App. 187-88. The District Court also assumed that federal grant money would end and that no "state funds" would replace expiring "federal grants." Together these findings caused the District Court to conclude in 2000 that the State's Group "B" weight appropriation "in combination with its property based financing scheme" was inadequate. App. 187.

IV. The Evidentiary Record

A. Arizona Adopted a New Theory of ELL Instruction After the Original 2000 Order.

The theories of bilingual and ESL instruction pursued at NUSD were swept away with the passage of Arizona Proposition 203 by voters in November 2000.[6] Proposition 203 required ELL students to be taught through structured English immersion ("SEI") strategies so that all ELL students are placed in English language classrooms and taught in English. All of NUSD's schools followed this method of instruction by June 2005. Tr.Day4, p.10. This meant that the dual language approach inherent in bilingual and ESL strategies and which formed a critical part of the analysis in the original 2000 order no longer applied.

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[6] Proposition 203 is codified at Ariz. Rev. Stat. §15-751 *et seq*.

To ensure that there were qualified teachers to teach this newly adopted SEI methodology, the State Board of Education required educators to be trained. TE 206. A curricular framework for instruction was adopted by the State Board in 2005, and all educators initially were required to receive at least a provisional SEI endorsement, and be fully endorsed within three years thereafter. Tr.Day1, p.57; TE 206. The Arizona Department of Education ("ADE") approved curriculum frameworks and developed a list of providers to perform training. Tr.Day1, p.58. In addition, Arizona House Bill 2010 provided $4.5 million annually for three years so that teachers could obtain this training. TE 208, p.18; Tr.Day1, p.63.[7] ADE also formed partnerships with entities so that teachers could obtain such training at a nominal cost. *Id.*, p.64-65.

The State also created English language proficiency standards that were tied to Arizona's language arts academic standards. *Id.*, p.36. Arizona was required to adopt these standards under NCLB. *Id.*, p.46. These standards were approved by the State Board in 2004 and were provided to every school district in the State. *Id.*, p.40. Those standards were crucial in providing guidance to teachers on what to teach and developing an appropriate and consistent curriculum for ELL students. *Id.*, pp.41-44.

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[7] These are non-reverting funds and $8,000,000.00 was left in the teacher training fund at the time of the 2007 evidentiary hearing. TE 225.

By 2007, ADE had become fully engaged in the delivery of ELL services. The State provided uniform procedures and tests for the identification and placement of ELL students. TE 203-204. It conducted outreach programs to ELL educators to assist in professional development. Tr.Day1, pp.66-68. It doubled the number of schools that it was required to monitor under the *Flores* Consent Decree.[8] *Id.*, p.73. Further, a major expansion of staff permitted technical assistance to be provided to school districts so that districts could adopt successful strategies for teaching ELL students. *Id.*, pp.70-76.

The passage of Proposition 203 presaged a new era of ELL education in Arizona. The State transformed the SEI theory of instruction into a success story by providing the kind of assistance that the District Court found was lacking in the original 2000 order with respect to bilingual and ESL education. The evidentiary hearing showed that the State was at the very center of ensuring that teachers were properly trained, endorsed, and possessed English proficiency standards to guide their teaching.[9]

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[8] The Consent Decree (CR206), referred to in the Ninth Circuit's opinion, required ADE to monitor school districts and review various aspects of ELL programming.

[9] HB2064 (I. App. 268a, 282a-83a) enacted in March 2006 further advanced ELL education. It required four hours of ELD instruction for beginning ELL students and established a task force to create ELL instruction models that school districts must follow. Those models deal with class ratios, quality of teachers, training, and time spent on ELD for all ELL students. Tr.Day1,

(Continued on following page)

The effect of this new program at NUSD was dramatic. Tr.Day4, pp.9-10. At the time of the evidentiary hearing, SEI instruction (rather than bilingual or ESL instruction) was offered in small groups at the elementary schools. Small self-contained ELD classes were provided at both the middle schools and high school. Tr.Day6, pp.20-25. Unlike in 2000, when substantial numbers of ELL students received no ELD, a minimum of two hours of daily ELD instruction was offered to all of NUSD's ELL students. *Id.*, pp.53-54. The new SEI program, substantial state support for that program, and changes within NUSD remedied those deficiencies in its ELL program which were identified in the original 2000 order.

B. Arizona Complies with the Federal Accountability Requirements of ELL Students.

One year after the original 2000 order was entered, Congress passed NCLB. NCLB seeks to improve the academic achievement of language instruction for limited English proficient and immigrant students. 20 U.S.C. §6801, *et seq.*, App. 234. Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the State and local school districts to carry

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pp.153-56. These models went into effect for the 2008-2009 school year.

out the goals of Title I. 20 U.S.C. §6311, *et seq*. App. 196. Further, NCLB requires that a statewide accountability system be established to ensure that local districts make adequate yearly progress ("AYP") and that the system includes sanctions to hold school districts accountable. TE 211; Tr.Day5, pp.151-53, App. 199-212. ELL students are a specifically defined subgroup of NCLB and they must meet annual measurable achievement objectives ("AMAO") for both academic AYP and progress toward attainment of English proficiency. 20 U.S.C. §6842. TE 211; Tr.Day1, pp.157-62; App. 255.

As a result of the passage of NCLB, ADE made major changes to assure that all Arizona ELL learners received "appropriate action" from their local school districts. ELL proficiency standards were promulgated to provide benchmarks for learning English, to allow school districts to design proper curriculum, and to permit ELL students to meet Arizona's language arts and academic standards. TE 202; Tr.Day1, pp.36-45. Arizona also adopted uniform assessment standards to identify and evaluate ELL students. That system classifies ELL students, determines when they are English proficient, and provides a tracking system to ensure that fluent English proficient students ("FEP") remain proficient. TE 203, 204; Tr.Day1, pp.46-54. Further, Arizona requires all teachers to undergo training and obtain SEI endorsements so they can effectively teach ELL students.

ADE not only provides wide ranging monitoring and technical assistance, it assists underperforming and failing schools through "solutions" teams comprised of the best educators in Arizona to identify problems, evaluate teaching methods, and provide suggestions for improvements. This program provides substantial assistance to ELL students who tend to live in lower socioeconomic neighborhoods. Tr.Day5, pp.156-60. In short, the enactment of NCLB and the changes in state programming for ELL education led to a systemic overhaul of Arizona's ELL programs. Many of these steps were approved by the federal government and none of them existed before 2000. Tr.Day1, pp.36, 43, 45, 47, 50, 55, 65, 70, 158.

NCLB also sets certain minimum targets so that specified percentages of a school district's or charter school's ELL students must (1) make progress towards proficiency, (2) achieve proficiency, and (3) achieve success academically (AYP) on Arizona's AIMS tests.[10] *Id.*, pp.158-59; 20 U.S.C. §6842. Those achievement benchmarks are documented annually through an AMAO score. Arizona's required percentages have been approved by the United States Department of Education and every school district and charter school is required to meet these pre-set percentages. *Id.*, pp.160, 187. Further, when a district

[10] "AIMS" or Arizona's Instrument to Measure Standards, are standardized academic tests in English for reading, writing, and mathematics given to all students, including ELL students, at various grade levels. Ariz. Rev. Stat. §15-741 *et seq*.

does not meet its annual measurable achievement objective (AMAO) requirements, the school district receives a warning the first year; the second year it receives technical assistance; and the third year Arizona will fund school improvement plans. Tr.Day1, p.161. None of these requirements was in place prior to the year 2000.

NUSD met all AMAO requirements for 2006. TE 218; Tr.Day1, p.188. NUSD vastly exceeded the NCLB proficiency requirements at every single grade level. Tr.Day1, pp.186-89; App. 312.

C. The Fiscal Assumptions of the Original 2000 Order Have Been Refuted by Intervening Events.

The District Court in the original 2000 order found that general education funding had been starved in the 1990s, NUSD could not pass an override, federal funds were drying up, and Group "B" weight money alone was not adequate to support an effective bilingual and ESL program at NUSD. Those findings are no longer valid.

First, equalization funding for maintenance and operations significantly increased. In 2000, such funding, statewide, totaled $3,431,059,000.00. This increased to $4,849,063,800.00 in the 2006 fiscal year. TE 225, p. 2. Translated on a per student basis, equalization funding increased from $4,084.00 in the 2000 fiscal year to $4,837.00 in the 2006 fiscal year. TE 225. Further, the 2007 budget provided new funding of

$80,000,000.00 to establish a new kindergarten Group "B" funding weight and another $100,000,000.00 for salary increases for non-administrative school personnel. TE 227.

More importantly, in November 2000, Arizona voters provided a significant boost in overall education funding and limited the ability of the legislature to lower equalization funding. They enacted Proposition 301, which increased sales tax revenue by .6% in order to provide added funding through a classroom site fund. This money was to be used for increasing base teacher salaries, for teacher performance pay, and for "menu items" such as tutoring and reducing class size. Tr.Day4, pp.116-24; TE 225. Proposition 301 had a major impact in increasing monies for education. For example, Proposition 301 added $235,346,200.00 to equalization funding in fiscal year 2002 and this increased to $494,572,500.00 in fiscal year 2006. TE 225. Further, one of the central concerns of the original 2000 order was addressed by the voters. Arizona Revised Statutes §15-901.01 (established by Proposition 301) required the legislature to increase base level funding by 2% each year through fiscal year 2006, and, thereafter, to be increased by 2% or the change in the GDP price adjuster, whichever is less. Base level funding could never be decreased below the 2001-2002 level. Tr.Day4, p.122.

Arizona HB2010 increased the Group "B" weight of ELL students from .060 to .115. The net result was to increase Group "B" weight monies from $140.00 per ELL student to $350.00 per ELL student. *Id.*,

p.136; TE 208. The legislature, through HB2010, provided compensatory instruction for ELL students who needed intervention through tutoring or individualized instruction. For such purposes, the legislature appropriated the sum of $3,080,000.00 for fiscal year 2002, the sum of $5,500,000.00 for fiscal year 2003, the sum of $5,500,000.00 for fiscal year 2004, and the sum of $5,500,000.00 for fiscal year 2005. School districts did not spend all of these monies and $900,000.00 remained in this fund as of the date of the evidentiary hearing. TE 225, Tr.Day4, pp.126-28. Finally, HB2010 provided $4.5 million through fiscal year 2005 so school districts could purchase ELL materials.[11] TE 225.

Arizona HB2064 appropriated $10,000,000.00 in fiscal year 2007 for ELL compensatory education. TE 210. It provided additional funding of $2,555,000.00 and $4,610,000.00 to cover school district costs for providing English language proficiency tests and ancillary materials and added twenty new positions so ADE could increase technical assistance to school districts for ELL programming. TE 225.

As a result of both State and local funding increases, NUSD revenues soared after 2000. For

[11] As noted earlier, House Bill 2010 also provided non-reverting funds for teacher training totaling $13,500,000.00. At the time of the hearing, $8,000,000.00 of these funds had not been used by school districts. Tr.Day5, p.91; TE 225.

example, NUSD passed an override right after the original *Flores* opinion issued and continued to pass overrides each year through the 2007 evidentiary hearing.[12] As a result, NUSD had available an additional $1,674,000.00 for operations that was not available in 2000. TE 225, p. 5. Indeed, monies from state, county, and local sources increased the NUSD maintenance and operation budget from $22,195,385.00 in FY2000 to $28,956,939.00 in FY2007, a 30% increase. This occurred even though the student population decreased from 5,989 in FY2000 to 5,865 in FY2007 and the ELL population decreased from 5,104 in FY2000 to 2,474 in FY2006. TE 225.[13]

Arizona made structural changes in general and specific ELL funding that enhanced NUSD's ability to fund all of its programs, including ELL programming.

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[12] In the original 2000 order, the District Court inaccurately indicated that NUSD was unlikely to pass an override to supplement its maintenance and operations budget. App. 166.

[13] The original 2000 order also found that federal grant money for ELL students in the future would be drastically reduced. App. 179-81. This prognostication proved wrong. Additional federal dollars have poured into the State as a result of NCLB. At NUSD, Title I monies increased from $1,644,029.00 in 2000 to $3,074,587.00 in 2006, Title II monies increased from $216,000.00 in 2000 to $466,996.00 in 2006, and Title III monies, which did not exist in 2000, increased from $261,818.00 in 2003 to $322,900.00 in 2006. There were significant carryovers in each of those funds. TE 224, 225, 235.

NUSD joined in the effort to broadly increase funding when its voters taxed themselves and passed an override. In short, Arizona's citizens and locally elected politicians collectively addressed the funding concerns raised in the original 2000 order by providing more financial assistance generally and more ELL assistance specifically.

D. New Management at NUSD Energized Education at NUSD.

Kelt Cooper, NUSD's new superintendent from August 2000 to June 2005, found on his arrival that NUSD was dysfunctional. He testified that had additional money been provided in 2000 without major changes in NUSD's educational structures, those infusions would have made no difference in outcomes. Tr.Day4, p.71. In its March 22, 2007 order, the District Court credited Mr. Cooper with achieving improvements at NUSD. App. 97. The uncontroverted evidence was that most of the problems at NUSD had little to do with money, but resulted from lack of leadership and lack of good management. By the time Mr. Cooper left, the problems set forth in the original 2000 order had essentially been solved and ELL students were learning English and advancing academically. Tr.Day4, pp.61-64, 66-67. Indeed, during his tenure as superintendent, no one ever advised him that ELL programs needed more money. *Id.*, p.65.

Class sizes were a serious problem when Cooper arrived. He found that these high class sizes largely resulted from NUSD's failure to enforce its own attendance policies. Tr.Day3, pp.201-13; Tr.Day4, p.4. NUSD was permitting students from Mexico to attend its schools.[14] It allowed a neighboring school district to send its students to NUSD even though NUSD lacked room for those students. Tr.Day3, pp.203-13. The school board addressed these problems by setting goals to achieve low student teacher ratios and allowing Cooper to vigorously enforce NUSD's attendance policy. *Id.*, pp.210-12; TE 212. Those goals were met in 2002. Tr.Day3, p.212. Indeed, the reduction in class size was accomplished without hiring any new teachers. Tr.Day4, p.94. After Cooper left, NUSD reduced class sizes even further. Tr.Day6, pp.24-25.

There was a lack of textbooks, not from insufficient funds, but from a decentralized purchasing policy with zero accountability. Cooper found that some textbooks were so old that they did not even align with the State's academic standards. Tr.Day3, pp.216-18; Tr.Day4, pp.15-23. After the original 2000 order, this dysfunctional purchasing policy ended, and

[14] Nogales is a border town with Mexico. In one instance, Cooper found that thirty students listed a single address in Nogales as their residence.

formal centralized book adoption processes were adopted so that NUSD had sufficient instructional materials. *Id.*, pp.18-23.

Lack of quality teachers was also a problem. Cooper described a practice under which NUSD not only hired student teachers with no degree, but also teachers from Mexico who were unable to speak English so that students could be "bicultural." *Id*. pp.7-8, 62, 95. These teachers were hired under the misnomer "Master Teachers." Those practices ended. *Id.* pp.7, 63. To attract better teachers, NUSD changed its policies to allow year-for-year credit for teaching experience. The resulting pay increases attracted more qualified teachers. *Id*. pp.5-7. Indeed, salaries dramatically increased and NUSD's average salary climbed from $31,055 in 2000 to $41,105 in 2006. TE 236.

The original 2000 order noted there was a lack of teacher aides. App. 187. Cooper found that the aides used at NUSD were ineffective, unqualified, and could not even speak English. A decision was made by NUSD to largely eliminate aides, thereby making funds available for other, more beneficial purposes such as the hiring of quality teachers. Tr.Day3, p.223; Tr.Day4, pp.11-14.

Cooper also found a lack of intellectual rigor and ended policies of social promotion and interdisciplinary courses that tolerated teaching in subjects such as mathematics for only one and one-half hours per week. Tr.Day4, pp.24-43. He addressed outdated

addenda for teachers and ended abuses relating to teacher release time. *Id.* pp.43-46, 48-50. Cooper instituted improvement plans at each school, zero based budgeting, expanded remediation efforts, and established clear achievement goals. *Id.* pp.26, 31-34, 54.

E. NUSD Runs an Effective ELL Program.

ADE sent a Task Force to NUSD in March 2006, after testing data showed that ELL students at four of NUSD's schools scored in the top ten in the State on Arizona's AIMS test. The purpose of the Task Force was to determine how NUSD was able to produce such excellent results. Tr.Day1, pp.163-65; TE 214. Irene Moreno, head of ADE's English Acquisition Unit, determined that NUSD conducted an effective ELL program because it employed four basic strategies. First, NUSD's schools provided small SEI classes that emphasized English language development. Second, intervention strategies were used so that ELL students who needed help were given special attention during the school day. Third, tutoring took place before, during, and after school. Finally, a software program was used to evaluate progress of ELL students so teachers could obtain immediate feedback and focus on an individual student's needs. Tr.Day1, pp.166-69; TE 214.

The Task Force also reviewed deficiencies listed in the original 2000 order. Those deficiencies were ameliorated or cured.

The original 2000 order cited an inadequate number of classrooms in NUSD. App. 187. That condition was eliminated. TE 214, 225, p.7; Tr.Day1, p.174.

The original 2000 order determined that there was insufficient tutoring and insufficient language development during the day. App. 178, 187. The March 2005 ADE site visit demonstrated that not only was ELD being provided, but NUSD established intervention measures to benefit ELL students during the school day, offered summer school remediation programs, and, as noted, provided tutoring for its ELL students throughout the day. TE 214, Tr.Day1, pp.63-169.

The original 2000 order also raised concerns about student-teacher ratios. App. 187. ADE's Task Force actually counted the students at each school and confirmed that class size was no longer a problem. Tr.Day1, pp.171-72, 174; TE 214.

The original 2000 order stated that there were insufficient instructional materials for ELL students. App. 178, 187. With the exception of one middle school which only had classroom textbooks (an issue that was being resolved), NUSD had sufficient textbooks, and supplemental materials for its ELL population. Tr.Day1, pp.173, 177, 178, 182, 183; TE 214.

Though the original 2000 order complained about teacher aides, Cooper eliminated aides as a detriment to NUSD's overall program. App. 187. The Task Force found that this decision had no impact on the effectiveness of teachers. Tr.Day1, pp.170, 174.

The original 2000 order was concerned about teachers who were not trained and endorsed. App. 187. That issue was resolved when Arizona switched from bilingual/ESL strategies to SEI and the State undertook the responsibility for training and endorsing teachers in this new methodology.[15] When the Task Force visited NUSD, it found excellent teaching, particularly at the elementary school level. Tr.Day1, p.175.

Those material changes identified by the Task Force led to outstanding results at NUSD. By 2007, the number of identified ELL students had nearly been cut in half, due in large part to a substantial increase in ELL students becoming proficient in English more quickly and being graduated out of the ELL program and reclassified as mainstream students. TE 215. In a school district with nearly 50% of

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[15] Indeed, in the legislative history of the subsequently enacted NCLB, Congressional leaders noted the general failure of the bilingual strategy (in effect in Arizona in 2000) and endorsed the use of SEI that was adopted in Arizona by Proposition 203.

> [W]e adjust and change a large number of programs which really were not working all that well. For example, bilingual education, the second largest account under title I under the ESEA. ***Yet we know what happened to bilingual education. It got off track.*** Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there.

147 Cong. Rec. 13328 (Dec. 17, 2001) (statement of Senator Gregg) (emphasis added).

its population ELL and 75% of its students poverty stricken, an ADE study showed that at four NUSD schools some 70% to 80% of its ELL students who were classified in 2003 as ELL students passed all three AIMS tests in English in 2005. TE 216. These results placed these ELL students above the overall state average (including non-ELL students) of 66%. TE 217; Tr.Day5, p.134.

Every professional educator who testified about NUSD also concluded that at current levels of funding, NUSD (the only district at issue) provides an effective ELL program. Tr.Day1, pp.96-99, 113-14, 192; Tr.Day3, p.180; Tr.Day4, p.67; Tr.Day5, p.134. A nationally recognized expert, Dr. Rosalie Porter, testified about her investigation of the success of NUSD's ELL programs:

> I have a very high opinion of the Nogales Unified School District for the job it is doing for its ELL students . . . the high level of performance on AIMS tests, SAT-9 tests, the progress from year to year where improvement is shown, the high level of performance and high percentage of students tested is better than what I have seen in many places in California, Massachusetts and other places. This is just a fine performance.

Tr.Day1, p.113. Even the Plaintiffs' own witness, Dr. Guillermo Zamudio, NUSD's current superintendent, verified that NUSD conducts an effective ELL program and that it has sufficient classrooms, good student-teacher ratios, sufficient teaching materials,

experienced teachers, and now complies with federal requirements concerning ELL learners. Tr.Day6, pp.97, 98, 101, 107. In other words, Zamudio acknowledged that NUSD's ELL students were no longer being denied equal educational opportunities on par with their non-ELL peers.

F. The Ninth Circuit Ruling.

The Ninth Circuit acknowledged that the program deficiencies set forth in the original 2000 order had been "ameliorated," even cured. Nevertheless, the Ninth Circuit measured Rule 60(b)(5) relief, not in terms of effective programming or compliance with §1703(f), but solely in terms of whether Arizona's funding system, in particular Group "B" weights, covered the incremental costs of ELL education. According to the Ninth Circuit, "incremental ELL funding is what matters for EEOA purposes." App. 70. Under the Ninth Circuit's analysis, NUSD could have a first rate ELL program (a position taken by experts at the Rule 60(b)(5) hearing), yet there could be no relief from federal oversight if the money which funded the program came from non-earmarked sources.

The Ninth Circuit also determined that Arizona's compliance with the requirements of NCLB was irrelevant to whether Arizona had taken "appropriate action" under the EEOA. It found disparate purposes in the two statutes.

SUMMARY OF ARGUMENT

I. The touchstone for the decision in *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000) is that Arizona failed to fund and provide oversight of the dysfunctional bilingual and ESL education programs adopted in NUSD. As a result, the District Court determined that Arizona violated EEOA §1703(f). By 2007, however, conditions had materially changed. NUSD adopted a new theory of ELL instruction, SEI, as a result of a voter initiative. The State substantially increased both general funding and designated funding for ELL students. NUSD's citizens enacted overrides that provided unanticipated increases in funding. Common sense management at NUSD brought academic rigor, financial efficiencies, and better performance. Structural changes wrought by NCLB and State legislation placed the Arizona Department of Education at the very center in ensuring effective ELL programs. As a result, by 2007, NUSD's students engaged in a coherent program of instruction, were overcoming language barriers, and advancing academically. The purpose of §1703(f) had been fulfilled.

Nevertheless, the lower courts denied Rule 60(b)(5) relief on the mistaken ground that the original 2000 order required earmarked funding to cover the incremental costs of ELL education and that until this was done, there could be no compliance with the EEOA. This constituted error for several reasons.

First, in the context of institutional reform litigation, when the objectives of the original order have been fulfilled and a statutory violation cured, respect for principles of federalism requires the termination of federal oversight.

Second, the lower courts treated §1703(f) as a funding statute. In fact, it is a performance statute. When NUSD's ELL students, through SEI strategies, overcome language barriers and participate in instructional programs, compliance with §1703(f) is achieved. The lower court's ruling, by defining compliance in terms of a specific funding source, is disconnected to any violation of federal law.

Finally, state and local authorities are entitled to discretion in how to cure a federal violation. If they can do so with earmarked funding, earmarked funding in combination with other funding, more efficient management of resources, better oversight, or different programs, or any other combination they elect, they should be permitted to do so.

II. NCLB, enacted in 2001, sets forth specific requirements to ensure that school districts are held accountable to effectively teach ELL students English so they can achieve academically. Those specific requirements define the meaning of "appropriate action" under EEOA §1703(f). Arizona is in full compliance with NCLB. If Arizona is in compliance with specific federal requirements and standards for ensuring that ELL students attain English proficiency and advance academically, it is logically

inconsistent for the District Court to find that Arizona has not met the vague term "appropriate action" under §1703(f).

ARGUMENT

I. THE LOWER COURTS ERRED BY REQUIRING EARMARKED FUNDING FOR ENGLISH LANGUAGE LEARNERS TO ACHIEVE EEOA COMPLIANCE AND THEREFORE IMPROPERLY DENIED RULE 60(b)(5) RELIEF.

"[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 247 (1991). In this case, the "conditions" leading to Arizona's violation of the EEOA in 2000, were inadequate ELL programming, inadequate texts, unqualified ELL teachers, and overcrowded ELL classrooms. By 2007, these "conditions," which were the basis for the statutory violation, were cured. Accordingly, Rule 60(b)(5) relief should have been granted. By focusing exclusively on earmarked funding and ignoring all other factual and legal changes in NUSD's ELL program, the Ninth Circuit erred. That error should now be corrected.

A. In the Context of Institutional Reform, Rule 60(b)(5) Relief is Appropriate When the Statutory Violation Originally Identified Has Been Cured.

Rule 60(b)(5) of the Federal Rules of Civil Procedure allows relief where "the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application." Several of this Court's cases have rejected efforts to hang onto outdated and prospective orders when factual or legal circumstances have changed or the objectives of the original order have been fulfilled. For example, in *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991), this Court affirmed the proposition that when a constitutional violation has been rectified, judicial oversight should end. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court reversed a district court's refusal to modify a consent decree to allow double bunking in jail cells. It admonished the lower court to be flexible in tailoring modifications to consent decrees in institutional reform litigation and to be mindful of financial constraints in devising a remedy. More recently, in *Agostini v. Felton*, 521 U.S. 203 (1997), this Court granted relief from an injunction which prevented the public school board from using public funds to provide services for private parochial schools. The Court ruled that the petitioner was entitled to relief under Rule 60(b)(5) because there had been significant changes in the law regarding possible violations of the Establishment Clause:

> In *Rufo v. Inmates of Suffolk County Jail*, . . . we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a significant change either in fact or in law. . . . A court errs when it refuses to modify an injunction or consent decree in light of such changes.

521 U.S. at 215. These cases underscore the need for federal courts to exercise restraint, respect the allocation of powers within the federal system, and show deference for local and state governments, which bear the primary responsibility for assessing, solving, and dealing with problems of institutional reform.

In *In re Detroit Auto Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996), the court stated that a party is entitled to have an injunction modified when the original decree would not have been issued "on the state of facts that now exists." When it is no longer equitable to enforce a prospective judgment, a court should focus on whether intervening changes have eliminated the need for the original judgment. *Ass'n for Retarded Citizens v. Schafer*, 872 F. Supp. 689 (D.N.D. 1995), *rev'd, in part, on other grounds* 83 F.3d 1008 (8th Cir. 1996); *Imprisoned Citizens Union v. Shapp*, 461 F. Supp. 522 (E.D. Pa. 1978).

In another context, in *Missouri v. Jenkins*, 515 U.S. 70 (1995), this Court rejected the district court's imposition of various inter-district remedies intended to attract "white students" from the suburbs to desegregate an urban school district as a judicial remedy

that lacked a sufficient nexus to the original intra-district constitutional violation. In so doing, this Court reaffirmed the three part framework from *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to guide district courts in devising desegregation remedies. That framework established that a judicial remedy must (1) be determined by the nature and scope of the violation of federal law, *i.e.*, the remedy must be directly related to the violation; (2) be remedial in practice; and (3) take into account the interests of state and local authorities in managing their own affairs. *Missouri v. Jenkins,* embraces the principle that a remedy must be sufficiently tailored to cure the violation.[16]

Justice Thomas, in his concurring opinion, raised deep concern about the "extravagant uses of judicial power" and elaborated on the third-prong of the *Milliken II* framework:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of

[16] In *Spallone v. United States*, 493 U.S. 265, 272 (1990), this Court struck down a regimen of steep fines against members of a City Council because the District Court failed to "exercise the least possible power adequate to the end proposed."

> the federal courts and intrude into areas in which they have little expertise.
>
> . . . .
>
> But I believe that we must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.

515 U.S. at 133.

The Ninth Circuit decision is contrary to these principles of judicial restraint. It ordered an earmarked funding remedy without identifying a need or the specific problems that earmarked funding should address. It never explained why "appropriate action" cannot be satisfied through a combination of various measures including state and school district funding, districts being an instrumentality of the state. It failed to do this because compliance with the purpose of the statute had been achieved.

B. A Violation of the EEOA Is Cured By Performance, Not Funding.

"When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). *See also United States v. Locke*, 471 U.S. 84, 93 (1985) ("[A] literal reading of Congress' words is generally the only proper reading of those words.").

The EEOA §1703(f) (emphasis added) provides that a state shall not "deny equal educational opportunity to an individual on account of . . . national origin, by [failing] to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs." "Appropriate" (used as an adjective) means "right for the purpose, suitable; fit; proper." *Webster's New World Dictionary*, 68 (3d college ed. 1991). "Action" is defined as "an act or thing done." *Id.* at 13. Thus, the "ordinary meaning" of the phrase "appropriate action" is any "act or thing done" which is "right for the purpose."[17]

Here, the purpose of the EEOA is to assist ELL students to overcome their language barriers and to participate academically with their non-ELL peers. This purpose may be served by any number of suitable "actions" taken including adopting a sound program theory, hiring qualified teachers, employing adequate texts, and reducing class sizes. Funding may assist in accomplishing these tasks, but it is not

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[17] *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1040 (7th Cir. 1987) ("appropriate action . . . conferred substantial latitude" in choosing how to meet federal obligations); *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) ("appropriate action . . . indicates that Congress intended to leave . . . a substantial amount of latitude in choosing the programs . . . to meet" EEOA obligations); *Teresa P. by T.P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698, 714 (N.D. Cal. 1989) ("appropriate action . . . intended to ensure that school districts make 'genuine and good faith efforts' ").

an end unto itself. Although it requires "appropriate action," §1703(f) makes no mention of "funding," nor does it suggest that funding is the exclusive means through which "appropriate action" may be taken.

C. The State Has the Discretion to Choose the Method of Performance Appropriate to Achieve Compliance with the EEOA.

If a State is not in compliance with the EEOA, changes in the source of funding may or may not be appropriate to achieving compliance. As long as the State achieves performance by some action, it is not for the court to dictate some other action. *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

"Today, education is perhaps the most important function of state and local government." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (citation omitted). "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). In particular, courts have largely resisted the invitation to become intimately involved

in a state's decision-making processes on the issue of education funding. "It would be an unfathomable intrusion into a state's affairs – and a violation of the most basic notions of federalism – for a federal court to determine the allocation of a state's financial resources. The legislative debate over such allocation is uniquely an exercise of state sovereignty." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996).

Because the problems of financing and managing a public school system are highly complex, "there will be more than one constitutionally permissible method of solving them." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973). Consequently, "'the legislature's efforts to tackle the problems' should be entitled to respect." *Id.* The court should "make certain that professional judgment in fact was exercised," but "[i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). *See also Wyatt v. Rogers*, 985 F. Supp. 1356, 1386 (M.D. Ala. 1997) (choices made by state officials were given deference in determining whether state defendants complied with 1986 consent decree). Where a state's legislative efforts to comply with a remedial order are subject to scrutiny by a federal court, the standard of judicial review is highly deferential. *Id.* The EEOA requires the Court to "impose *only such remedies as are essential to correct* particular denials of equal educational

opportunity or equal protection of the laws." 20 U.S.C. §1712 (emphasis added).[18]

Furthermore, remedial orders "are not intended to operate in perpetuity." *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991). Rather, "a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995). In *Freeman v. Pitts*, 503 U.S. 467, 490 (1992), this Court stated:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.

The Ninth Circuit intruded on Arizona's fundamental right to impose taxes and allocate revenues for educational purposes. It usurped the power of

[18] The NCLB (addressed in detail below) also recognized the need to "strike[ ] the right balance between Federal and State responsibilities . . . recognizing that State and local officials and governments must take the lead in devising ways to implement this vision because they are ultimately closest to the schools with accountability to citizens at the local level." 147 Cong. Rec. 13331 (Dec. 17, 2001) (statement of Senator Bayh).

Arizona's elected representatives to make choices as to how a violation of federal law should be remedied. When compliance was achieved with less drastic remedies, control of funding for schools should have been restored to the State.

D. In this Case, the State of Arizona Achieved Compliance with the EEOA By Performance.

In ruling that Arizona must create an earmarked funding source to comply with §1703(f), the Ninth Circuit not only misconstrued the requirements of §1703(f), but also refused to allow the State to show that the purpose of the statute was fulfilled with less intrusive actions. This not only violates the spirit of federalism, it also runs afoul of the EEOA itself, which prohibits a federal court from imposing a broader than necessary remedy to cure a statutory violation. *See* EEOA §1712.

In this case, the undisputed evidence demonstrated that NUSD's programs were functioning effectively by 2007. Seven years after the original 2000 order was entered, the NUSD ELL program had undergone a complete overhaul including a reorganization of programming, management, and, indeed, even funding. By focusing *only* on the source of funding instead of these vast improvements in NUSD's performance, the Ninth Circuit extended the remedy for the original violation far beyond that which the EEOA was designed to protect. Contrary to the Ninth

Circuit's analysis, the EEOA does not guarantee every ELL student a specific amount of earmarked funding. Rather, it guarantees every ELL student "appropriate action" to assist them in overcoming their language barriers. The record is clear that "appropriate action" was taken in this case.

1. Performance By Effective ELL Programs.

The Ninth Circuit minimized uncontradicted testimony that NUSD now conducts an effective ELL program and that the adverse conditions described in the original 2000 order no longer exist, and, instead, compared the performance of ELL students on Arizona's "AIMS" academic achievement tests to their English-speaking counterparts, to reach the conclusion that the NUSD's progress is limited because ELL students lag behind *all* students in terms of ELL scores on AIMS. App. 32; 36-38. Reliance on such test scores to measure the effectiveness of an ELL program is misplaced and inappropriate.[19] AIMS tests

[19] Indeed, the Ninth Circuit ignored the inconvenient fact that the more affluent Scottsdale Unified School District spends more than twice as much money as does NUSD for its ELL students, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than NUSD's ELL 10th graders. (TE 12; TE 7, p. 3; TE 219; TE 245). This drives home the point that requiring Arizona to provide a dedicated stream of income is not the critical factor in determining positive outcomes for ELL students. What is critical is effective school management and good ELL programs. "It is

(Continued on following page)

are given in English. ELL students are not yet proficient in English. It is self-evident that ELL students would not do as well on AIMS and would certainly lag behind those who are literate in English. Any ELL student who passed the AIMS test when taken must have been proficient or he could not have passed those tests. It is profoundly unrealistic to expect an equal percentage of ELL students to pass AIMS as English proficient students. Yet, this is precisely what the Ninth Circuit demanded before deeming Arizona in compliance with the EEOA. This fundamental misunderstanding by the Ninth Circuit underscores the need for judicial restraint.

The Ninth Circuit's flawed focus on test scores is matched by its striking failure to discuss NUSD's achievements on its annual measurable achievement objectives (AMAO), NCLB's accountability standards for ELL students. An AMAO requires a showing that ELL students are progressing in learning English, attaining proficiency, and making adequate yearly progress (AYP). 20 U.S.C. §6842. Arizona instituted proficiency tests that were aligned to its English language proficiency standards to measure the extent to which ELL students were progressing towards and attaining proficiency and complying with AYP requirements. Tr.Day1, pp.48-52, 185. The

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beyond the competence of the courts to determine appropriate measures of academic achievement. . . . The law does not require perfection." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1518-19 (D. Colo. 1983).

federal government under NCLB requires specific percentages of ELL students to show gains in all three categories and these are documented on an AMAO. Tr.Day1, pp.186-187. NUSD's ELL students exceeded these standards in every category, which means that sufficient numbers of ELL students not only made appropriate progress in learning English, but also became proficient.

When judged by federal AMAO accountability standards, the result of the new SEI program clearly demonstrated "appropriate action." ELL students are classified into five different levels of proficiency: Pre-Emergent, Emergent, Basic, Intermediate, and Proficient. In 2006, the federal government required 12% of each school districts' ELL population to (1) improve their proficiency by one level, (2) attain proficiency, and (3) pass AIMS. Tr.Day1, pp.185-190. At NUSD, in 2006, the percentage of NUSD's ELL students achieving progress by advancing one level varied from 70% to 88%. App. 312. The percentage of NUSD's students who became proficient in English so as to be reclassified as non-ELL students ranged from 29% to 38%. *Id.* Finally, at every grade level, NUSD's ELL students met the federal government's AMAO accountability standards. These numbers show that NUSD's ELL students are vastly exceeding federally approved standards, overcoming language barriers, and able to participate in their school's English instructional programs.

Not only are ELL students at NUSD becoming English proficient in large numbers, but once proficient, these reclassified students scored as well on Arizona's AIMS tests as NUSD's English speaking students. This is demonstrated by a table produced by Plaintiffs' witness, Dr. Zamudio. App. 310, 311. For example, reclassified ELL third graders, on AIMS, scored 474.3 in mathematics, 477.7 in reading, and 460.1 in writing. English speaking (non-ELL) students for third grade scored 479.0 in mathematics, 473.2 in reading, and 438.8 in writing. Reclassified eighth graders scored 563.6 in mathematics, 524.2 in reading, and 576.6 in writing. English speaking students scored 565.0 in mathematics, 536.7 in reading, and 574.8 in writing. The performance was comparable across all the grades. This data indicates that NUSD's ELL students are achieving proficiency and are able to equally participate in the academic programs of their schools as required under §1703(f). That constitutes performance.

The Ninth Circuit also claimed that NUSD is not meeting federal performance criteria under NCLB. App. 38. It is true that Nogales High School, Pierson Vocational High School (the alternative high school), and Mary L. Welty Elementary School did not make adequate yearly progress under NCLB for fiscal year 2005-06. TE 21. The evidence demonstrated, however, that this had nothing to do with the ELL sub-group. TE 21.

2. Performance By Increased Funding.

The District Court in 2000 was also dealing with a different era when it came to state funding. Major structural changes in the law, including voter initiatives, caused significant infusions of new state money since 2000 for both general funding and designated ELL funding. By passing an override and taxing its citizens, NUSD added significant money, an event unanticipated by the original 2000 order. Uncontroverted evidence demonstrated that monies from state, county, and local sources increased the NUSD maintenance and operations budget from $22,195,385.00 in 2000 to $28,956,939.00 in 2006, while the number of students at NUSD slightly decreased during that time frame. This general funding increase most certainly enabled NUSD to lower class sizes, hire better teachers, and implement remedial, tutoring, and intervention programs for ELL students. TE 229, 246. The Ninth Circuit refused to consider that general funding increases benefited all students, including ELL students. It also overstepped its judicial authority by insisting on a separate funding source (rather than confining its scrutiny to the EEOA requirement of "appropriate action") when current funding is sufficient to operate an effective ELL program.

As a justification for earmarked funding, the Ninth Circuit asserted that NUSD and other school districts should not be forced to take monies from general purpose funds and apply them to ELL programs. It claimed that such a practice would adversely impact

programs for non-ELL students. There was nothing in the evidentiary record to support this claim. In fact, the expansion of general funding inherently benefits *all* students, including ELL students. When increases in general funding lower class sizes, augment staff, achieve greater salaries, permit purchase of additional materials, provide more tutoring, and fund full time kindergarten classes, all students flourish, ELL and non-ELL alike.[20]

> ***A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable.*** The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. . . .
>
> ***The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects.*** "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of*

[20] There was very little evidence in the record regarding non-ELL programs since the evidentiary hearing was focused on ELL programs. However, at NUSD, non-ELL students were taught in appropriate sized classes and by experienced teachers. Tr.Day6, pp.97-98, 107. Further, the reforms instituted by Cooper benefited all students. Dr. Zamudio, in 2006, extolled the performance of NUSD's English proficient students by noting that their scores on Arizona's AIMS tests far exceeded state averages. TE 221, pp.1, 7.

> *Education*, *supra*, 402 U.S. at 16, 91 S.Ct. at 1276.

Evans v. Buchanan, 555 F.2d 373, 379-80 (3d Cir. 1977) (emphasis added).

This Court admonished in *Missouri v. Jenkins*, that remedies must be narrowly tailored to cure the conditions that violate federal law. 515 U.S. at 88. To do that, there needs to be a clear understanding of the conditions requiring correction. Further, to assure that the remedy is narrow, it is critical to devise the least intrusive means to solve the identified problems. The Ninth Circuit, in its entire opinion, never addressed the fundamental issue of whether "appropriate action" was provided by an ELL program that was reasonably calculated to overcome language deficiencies so that ELL students could achieve academically. Nor did it even identify specific problems at NUSD which amounted to a violation of federal law.

The reason that the Ninth Circuit failed to identify remaining deficiencies in the ELL program that violated federal law is that those prior deficiencies were cured. Every expert who opined on the condition of NUSD's ELL program found it to be effective and in compliance with §1703(f). Even Plaintiffs' own witness, Dr. Zamudio, testified to current compliance with §1703(f). He stated:

> Q. With your current ELL program, it is an effective program but it can become better? Have I said that right?

A. Yes sir.

. . . .

Q. Your district currently meets federal requirements relative to English language learners, correct?

A. To my knowledge, we make every assurance that we meet the requirements set forth.

Tr.Day6, pp.84, 98.

Despite the undisputed evidence that NUSD's ELL students are now receiving an equal and adequate education, the Ninth Circuit also claimed that Rule 60(b)(5) relief was still inappropriate. In so doing, it urged that the original 2000 order required Arizona to increase its Group "B" weight funding to cover the incremental costs of ELL programs. App. 49, 67-69. It further asserted that the Superintendent's positions, even if true, constitute an end run around a final judgment that was not appealed. App. 51, 61-63.

Contrary to the Ninth Circuit's ruling, there was no directive in the original 2000 order that an earmarked funding source was required to correct the violation of §1703(f). Indeed, the opposite is true. There would have been no need to discuss base level funding, overrides, Group "B" weight funds, and other sources of income if the District Court believed that only one source of money could be utilized to pay the costs of ELL programming and cure a §1703(f) violation.

In addition, the original 2000 order was not focused solely on funding. It connected funding to detailed findings relating to a dysfunctional system in which substantial numbers of ELL students received no ELD instruction, a dysfunctional system that has since been eradicated. Rule 60(b)(5) relief was therefore appropriate.

II. NCLB'S SPECIFIC STANDARDS FOR THE IMPLEMENTATION OF ADEQUATE ELL PROGRAMS SHOULD BE USED TO DEFINE THE MEANING OF "APPROPRIATE ACTION" UNDER THE EEOA.

A. The Meaning of a General Statute May Be Defined by Subsequent, More Specific Legislation Addressing the Same Subject Matter.

To the extent that the term "appropriate action" is not defined in the EEOA and is ambiguous, as acknowledged in *Guadalupe Organization, Inc. v. Tempe Elem. School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978) and *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), it is well settled that subsequent legislation may be considered to interpret prior legislation on the same subject. *Busic v. United States*, 446 U.S. 398 (1980); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Great Northern R. Co. v. United States*, 315 U.S. 262 (1942); *State v. Oregon Short Line R. Co.*, 617 F. Supp. 207 (D. Idaho 1985). Further, different statutes which address the same subject matter should be read together such that the

ambiguities in one may be resolved by the other. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001).

"At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). In other words, "a specific policy embodied in a later federal statute should control our construction of [an earlier] statute, even though it ha[s] not been expressly amended." *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998).

B. Although the General Phrase "Appropriate Action" Used in the EEOA Is Ambiguous, the NCLB Contains More Specific Guidelines for the Implementation of Adequate ELL Programs to Satisfy the Statutes' Identical Goals.

Section 1703(f) of the EEOA obligates the State to take "appropriate action to overcome language barriers" that prevent ELL students from equal participation in the educational process. As noted

above, the statute does not define "appropriate action."[21] Courts have grappled with the meaning of "appropriate action." In *Guadalupe*, the Ninth Circuit noted that there is "very little legislative history" for §1703(f) and that there had been no decision interpreting the "appropriate action requirement" of §1703(f). 587 F.2d at 1030. Later, in *Castañeda*, the Fifth Circuit judicially crafted a three-part test to give definition to the words "appropriate action."[22] The *Castañeda* court also described the lack of legislative history to divine congressional intent, but stated two things about the words "appropriate action." First, it underscored that the vague term "appropriate action" meant that state and local authorities were to have a "substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations" under §1703(f). 648 F.2d at 1009. Second, the *Castañeda* court observed that the lack of Congressional guidance as to the meaning of "appropriate action" forced that court to prescribe standards, although it was "ill equipped to do so" and such a task was better

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[21] "[I]t is noted that the legislative mandate to take 'appropriate action to overcome language barriers' appearing in §1703(f) is not a particularly helpful contribution." *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1521 (D. Colo. 1983).

[22] The three prong test requires an educational agency to (1) adopt a recognized educational theory; (2) provide programs reasonably calculated to implement the theory; and (3) show, after a period of time, that language barriers are being overcome. 648 F.2d at 1009-10.

"reserved to other levels and branches of government." *Id*.

In contrast to the vague "appropriate action" standard set forth in the EEOA, in promulgating NCLB, Congress has now prescribed those standards which the *Castañeda* court previously lamented were lacking. NCLB specifically includes within its scope, improving the academic achievement of language instruction for limited English proficient and immigrant students (20 U.S.C.A. §6801 *et seq.*). Essentially, NCLB requires states receiving Title I and Title III funds to develop challenging academic content and student achievement standards that will be used by the state and local school districts to carry out the goals of Title I. *Id.*

If a later specific statute with the same purpose as an earlier vague statute is not used to define the vague terms, then a dilemma results: courts must develop specifics to enforce the vague terms, and, to the extent that they are inconsistent with the later statute, states are subjected to two sets of inconsistent requirements. NCLB prescribes a series of programs that a state must undertake so that ELL students achieve English fluency and academic achievement: certification of English fluency of teachers (20 U.S.C. §6826(c)); scientifically based research plan for teaching English (20 U.S.C. §6826(d)(2)); effective language curricula (20 U.S.C. §6826(d)(4)); establishment of proficiency standards and benchmarks with proficiency standards aligned to the State's academic standards (20 U.S.C. §6823(b)(2));

annual assessments to measure proficiency (20 U.S.C. §6823(b)(3)(D)); submission of detailed plans to the United States Department of Education setting forth standards, objectives, and school district accountability (20 U.S.C. §6823(b) & (c)); detailed school district plans to improve proficiency and academic learning (20 U.S.C. §6826(a) & (b)).

1. Goals of the EEOA and NCLB are Identical.

The purpose of both EEOA §1703(f) and NCLB is to ensure that there are effective ELL programs. The stated statutory purpose of NCLB with respect to ELL students is:

> ***To help ensure that children who are limited English proficient***, including immigrant children and youth, ***attain English proficiency***, develop high levels of academic attainment in English, ***and meet the same challenging State academic content and student achievement standards as all children are expected to meet***.

20 U.S.C. §6812(1) (emphasis added). In adopting this stated goal, Congress expressed its desire to "mak[e] sure everyone has an equal shot at the American opportunity through quality education." 147 Cong. Rec. 13327 (Dec. 17, 2001). (Statement of Senator Gregg). As stated in EEOA §1703(f), its purpose is "to overcome language barriers that impede equal participation by . . . students in . . . instructional

programs." There is no daylight between the two statutory goals.

The Ninth Circuit rejected this position and found that the purposes of the two statutes were different. It stated that NCLB is about a "general plan gradually to improve overall performance" of schools, but §1703(f) is an "equality-based civil rights statute" designed to deal with the immediate rights of ELL students.[23] No one disagrees that the two statutory schemes involve different remedies and may, depending on the circumstances, seek to redress different wrongs. EEOA §1703(f), however, requires "appropriate action" which can only mean a program reasonably calculated to teach ELL students English. NCLB actually delineates what programs states must implement to make sure school districts provide ELL students with a reasonable opportunity to learn English. In this fashion NCLB supplements and defines EEOA §1703(f). *See FDA v. Brown &*

[23] To the contrary, NCLB actually does contain a mechanism for individual students to file a complaint when their ELL programs are inadequate in one way or another. An NCLB complaint of this nature would be dealt with on an administrative level and resolved ultimately by the United States Department of Education if not resolved by a local or state agency. Accordingly, under *both* the EEOA and NCLB, a student need not wait "year after year" to pursue immediate relief for an alleged violation of his or her right to equal and adequate educational opportunities. *Compare Flores*, 516 F.3d at 1173 (Pet. App. 76) *with* 20 U.S.C. §7844(a)(3)(C). Arizona's NCLB complaint procedures are available at http://www.ade.az.gov/asd/Title1/PrivateSchoolSvcs/Complaint_Procedures.doc.

Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

2. The Meaning of "Appropriate Action" Under the EEOA Should Be Determined By NCLB's Specific Standards.

A change in law will factor heavily in warranting Rule 60(b)(5) relief in public interest litigation. *Agostini v. Felton*, 521 U.S. 203 (1997). The United States Department of Education is now deeply involved in the education of ELL students under NCLB. NCLB requires states to ensure that ELL theories of instruction are scientifically informed, that effective programs are instituted, and that positive results are obtained with accountability standards. NCLB, in essence, fleshes out the three-prong test in *Castañeda* to ensure that ELL students "overcome language barriers" so they can "participate in instructional programs." The subsequent and detailed statutory scheme of NCLB should control the interpretation of the prior enacted and general statute, §1703(f), when, as here, both statutes touch upon the same area and seek to achieve the exact same purpose. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("[A] specific policy embodied in a later federal statute should control our construction of [an earlier]

statute, even though it ha[s] not been expressly amended.").

C. Because Arizona Has Satisfied the Specific Standards For Its ELL Programming Set Forth Under NCLB, It Has Taken "Appropriate Action" Under the EEOA.

Arizona put into place an extensive curricular and instructional foundation to demonstrate to the federal government that Arizona school districts meet the programmatic and accountability requirements imposed by NCLB. Every other state receiving funding under NCLB must also meet these fundamental requirements. The federal government deems Arizona in compliance with NCLB and Arizona has worked closely with the United States Department of Education to ensure that its programs meet with federal approval. Tr.Day1, pp.36-45, 47, 50, 55, 65, 70, 158, 160, 187.

It is both unfair and irrational for the federal government, on one hand, to approve Arizona's ELL programs as effective under NCLB, but, on the other hand, for the Ninth Circuit to rule that Arizona has failed to take "appropriate action" to assure effective ELL programs under EEOA §1703(f). States should not be subject to the vague requirement and inconsistent interpretations of "appropriate action" under EEOA §1703(f) when NCLB spells out in detail the definition of what is "appropriate." States should be

subject to only one standard – the standard spelled out by Congress in NCLB and implemented by the United States Department of Education.

D. Interpreting the EEOA and NCLB Consistently Will Not Result in A "Repeal By Implication."

The Ninth Circuit refused to reconcile its interpretation of the EEOA with the specific policies and programs set forth in the subsequently enacted NCLB. Instead, it narrowly focused on the accountability requirement of NCLB which requires ELL students to meet "annual measurement achievement objectives ['AMAO'] . . . including . . . making adequate yearly progress ['AYP']" and concluded that acceptance of the Superintendent's position would effectively repeal §1703(f). App. 73. The Ninth Circuit claimed that if an AMAO was met one year and not the next, enforcement rights under §1703(f) would "wink in and out of existence." App. 77.

The Superintendent never claimed that NCLB negated the EEOA. An individual ELL student, in a proper case, would be entitled to bring an action under §1703(f) to remedy abuses which denied that student an opportunity to learn English. No claim is being made that the EEOA has no validity. But that is not what this case is about. This case is not about an individual student who was denied ELL services at a particular school. Ultimately, this case has

morphed into an assertion that Arizona systemically failed to ensure that there was effective ELL programming at NUSD and has thus failed to "take appropriate action" under the EEOA. However, NCLB was designed to ensure that states remedy systemic inadequacies and provide effective programs and positive outcomes for ELL students. That is why, in determining a systemic inadequacy, NCLB should be used as the measure of whether "appropriate action" has been achieved.

Writing for the majority in *Fausto,* Justice Scalia explained the difference between the argument that a statute has been "repealed by implication" and the argument that a *judicial interpretation* of a statute has been impliedly rejected by a later Act –

> ***Repeal by implication of an express statutory text is one thing***; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. ***But repeal by implication of a legal disposition implied by a statutory text is something else.*** The courts frequently find Congress to have done this whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that ***the implications of a statute may be altered***

> ***by the implications of a later statute***. And that is what we have here.

Fausto, 484 U.S. at 453 (emphasis added). The Superintendent here argues that there is no repeal. Rather, the latter statute gives specifics for an earlier vague statute that has an identical purpose.

Arizona now complies with the extensive accountability system of NCLB to ensure that ELL students master English and meet challenging academic requirements. The extensive requirements of NCLB for ELL students did not exist when the original 2000 order issued. They do now, and states know what they must do to comply with federal mandates regarding the advancement of ELL education. Arizona complies with those mandates. It is illogical for the Plaintiffs to claim that Arizona can simultaneously comply with the stringent requirements of NCLB and still violate the vague requirement of §1703(f) to "take appropriate action."

III. Conclusion.

This case concerns the power of the federal judiciary to require the State of Arizona to provide earmarked funding for ELL students as the sole means of satisfying a judgment declaring Arizona to be in violation of §1703(f) of the EEOA. Here, the Ninth Circuit required special funding although the purpose of §1703(f) was fulfilled by general funding increases, delivery of new state programs, the enactment of NCLB, and better management of ELL

services. The Ninth Circuit exceeded its powers and overrode notions of federalism, comity, and the need to tailor the scope of the remedy to fit the statutory violation. Further, the vague "appropriate action" requirement of EEOA §1703(f) should be interpreted in the context of the subsequently enacted specific standards pursuant to Congress' NCLB Act. States should not be left exposed to claims that they violated the EEOA when they are in full compliance with NCLB. The two statutes should be reconciled and interpreted consistently.

For all of the foregoing reasons, Petitioner respectfully requests that the decision of the Ninth Circuit be reversed and that the relief requested by the Rule 60(b)(5) motions be granted.

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